In the Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-654

ROBERT LEE PARKER,

Petitioner

versus

SOUTH LOUISIANA CONTRACTORS, INC., SOLOCO PIPELINE CONTRACTORS, INC., MARTIN EXPLORATION CORPORATION AND H. J. SERRETTE,

Respondents

BRIEF OF H. J. SERRETTE, RESPONDENT, IN OPPOSITION TO PETITION OF ROBERT LEE PARKER FOR WRIT OF CERTIORARI

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MAY IT PLEASE THE COURT:

H. J. Serrette adopts by reference the statement of the case found at pages 1 and 2 of the Reply Brief on behalf of South Louisiana Contractors, Inc. and Soloco Pipeline Contractors, Inc., Respondents.

I.

ALLEGED CONFLICT BETWEEN THE FIRST AND FIFTH CIRCUITS DOES NOT EXIST

Petitioner has alleged a conflict between the United States Courts of Appeals for the First and Fifth Circuits as to whether an accident occurring on a "ramp" gives rise to admiralty and maritime jurisdiction under 28 U.S.C. 1333, and in support of this assertion, petitioner has directed the Court's attention to *Romero Reyes v. Marine Enterprises, Inc.*, 494 F. 2d 866 (1st Cir. 1974). *Reyes* is clearly distinguishable from this case, and no conflict has in any way resulted from the Fifth Circuit's decision below.

The facts in *Reyes* involved an injury to a longshoreman on an actual gangway. Although the First Circuit found the gangway was "permanently affixed to a pier-based structure," it never even seriously considered that the particular structure on which the plaintiff was injured was anything other than a gangway. In the ordinary sense of the word, a gangway is a removable bridgelike structure placed over water between vessel and land. Nothing in the *Reyes* opinion indicates that anything other than such a structure was involved. Rather, the Court specifically noted that the gangway was "suspended from a tower on pilings next to the dock . . . and could be raised or lowered by cables attached to the tower." 494 F. 2d at 869.

On the other hand, the structure upon which Petitioner's alleged injury occurred was a ramp-like steel wharf located entirely upon and over dry land. Only the very edge of the wharf extended over water to enable barges to face up to it and debark overland vehicles. In order to move the wharf,

a major undertaking utilizing large equipment was required. Certainly, a structure most closely resembling a wharf dock or pier is not comparable to the gangway in *Reyes* and should by no means be considered an appurtenance of the barge from which Petitioner had debarked.

Furthermore, uncontroverted evidence, including Petitioner's own deposition, showed that the accident occurred while Petitioner was walking from one side of the wharf to the other at a location thereon directly over dry land. Petitioner did not even fall off of the ramp, much less into the water, a physical impossibility. It is factually inconceivable that Petitioner's accident could form the basis of a maritime tort to bring this case within the ambit of admiralty and general maritime law jurisdiction.

In *Victory Carriers, Inc. v. Law*, 404 U.S. 202 (1971), this Court held that federal maritime law did not govern the cause of action of a longshoreman injured on a pier by a defective forklift. The Court repeated that "the historic view of this Court has been that the maritime tort jurisdiction of the Federal Courts is determined by the locality of the accident and that maritime law governs only those torts occurring on the navigable waters of the United States." 404 U.S. at 205. It is clear that *Victory Carriers* remains the law of the land controlling a land-based casualty such as that alleged by Petitioner. In fact, as was pointed out by the Fifth Circuit in its opinion below at foot note 3, page 115, the effect of *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), which requires that a tort bear some significant relationship to some traditional maritime activity, in addition to it having occurred in a maritime locality, is to make the test for admiralty jurisdiction even more stringent.

Petitioner cites and provides quotations from *O'Keeffe, D.C. v. Atlantic Stevedoring Co.*, 354 F. 2d 48 (5th Cir. 1965) and *Michigan Mutual Liability Co. v. Arrien*, 344 F.2d 640 (2d Cir. 1965), in further support of his contention that admiralty jurisdiction exists in this case because the wharf upon which his injury occurred was analogous to a gangplank, but the Fifth Circuit correctly found that *O'Keeffe* and *Arrien* were inapplicable to the instant facts, stating as follows:

> "In *O'Keeffe*, the court held that there was coverage under the LHWCA for an accidental death which occurred when a longshoreman working on a dock was snagged by a ship's boom, swung against either the dock or the ship, and dropped into the intervening water. In reaching this result, the *O'Keeffe* court noted that
>
> > a gangplank, not being permanently attached to the land and traditionally, if not always so in fact, a part of the equipment of the ship, is regarded as a part of the ship so that an injury occurring upon a gangplank is regarded as having occurred upon navigable waters.
>
> 354 F. 2d at 50. Then, recapitulating the holding in *Arrien, supra*, the *O'Keeffe* court continued,
>
> > This rule has been recently extended so as to include as being over water, a skid which was impermanently affixed to the wharf although sufficiently connected with the land as to sustain an award to an injured longshoreman under a state workmen's compensation act. [Citing *Arrien.]*

Unlike the ramp in the present case the skid involved in *Arrien* and referred to in *O'Keeffe* extended entirely over water, and could be easily dismantled and stored on the wharf when not in use. See *Arrien, supra*, at 642-44. It was a removable wooden platform approximately six feet by ten feet, which extended over the waters between the vessel and wharf. *Id.* at 642. In contrast, the ramp in the present case rested on land, and removing it would involve a major undertaking calling for heavy equipment. Unlike a gangplank, it cannot reasonably be conceived as a appurtenance of the barges that use it for docking." 537 F. 2d 113, 115-116 (5th Cir. 1976).

Clearly, the Fifth Circuit has correctly decided that an injury occurring upon a land-based wharf, even though it resembles a ramp, is not sufficient to support admiralty jurisdiction on the basis of the standards established by this Honorable Court. Furthermore, since *Romero Reyes v. Marine Enterprises, Inc.*, 494 F. 2d 866 (1st Cir. 1974), involved an injury on a gangway, it is completely distinguishable from this case, and there is no conflict between the First and Fifth Circuits on this issue.

In a last ditch effort to find support for his jurisdictional arguments, Petitioner belatedly contends that admiralty and maritime jurisdiction exists because his alleged injury was allegedly aggravated as a result of the rescue efforts of a crew boat owned by Respondent, H. J. Serrette. Petitioner failed to press this aspect of his case in both Courts below, most

probably because of the tenuous nature of this claim against one acting as a Good Samaritan. The record is clear that Respondent Serrett's small boat acted as a gratuitous volunteer to evacuate Petitioner following his accident, and as such, Respondent's only duty to Petitioner would be to utilize due care under the circumstances. *Fidelity & Cas. Co. of N.Y. v. C/B MR. KIM,* 345 F. 2d 45 (5th Cir. 1965). Petitioner's only claims are 1) that he was required to crawl off the barge onto Respondent's vessel; 2) that he was required to crawl off the vessel, up a levee and across a parking lot; 3) that the vessel travelled at high speeds for an extended period of time; and 4) that the vessel lacked proper medical gear. When these last ditch allegations were raised in the District Court, that Court properly recognized that the vessel in question, manned by one crewmember, was never intended to be an ambulance; that it utilized the only available means of ingress and egress for Petitioner; and that the allegations, even if true, were insufficient to support a finding of any breach of the obligation of due care under the circumstances owed to Petitioner.

II.

1972 AMENDMENTS TO LHWCA DO NOT EXTEND ADMIRALTY JURISDICTION

Petitioner contends that the 1972 Amendments to the LHWCA legislatively overrule the holding of *Victory Carriers v. Law,* 404 U.S. 202 (1971). Certainly, petitioner has misconstrued not only the legislative intent behind the Amendments, but also the very language of the Amendments. *Victory Carriers* dealth with a longshoreman's claim, not against his employer for compensation, but against the owner of the vessel which was alongside the wharf upon which he

was injured. This Honorable Court held that such a claim, as against a non-employer, was governed by state rather than federal maritime law. The latter governs only those causes of action arising upon navigable waters.

The 1972 Amendments to the LHWCA extend coverage of that Act *with regard to compensation claims against employers only.* §903(a) of the Act states as follows:

> "(a) *Compensation* shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel)."
> (emphasis supplied) 33 U.S.C.A. 903.

The 1972 Amendments to the LHWCA mention *nothing* which could be construed as extending admiralty jurisdiction in an action against a non-employer to cover a land-based casualty. The Act's coverage has been extended *only* with regard to compensation claims by a longshoreman or harbor worker against his employer. "The intent of the committee is to permit a *uniform compensation system* to apply to employees who would otherwise be covered by this Act for part of their activity." (emphasis system) 1972 *U.S. Code Cong. and Adm. News,* pp. 4707-4708.

Coppolino v. International Terminal Operating Company, Inc., 1974 A.M.C. 2422 (U.S. Dept. of Labor, Benefits Review Board, 1974) is clearly distinguishable from this case as that matter dealt solely with a claim for compensation under

the 1972 Amendments to the LHWCA. In addition, the question of constitutionality with regard to the coverage of the Act vis-a-vis the longshoreman's employer is totally irrelevant in this case involving tort claims against non-employers.

Petitioner next contends that the 1972 Amendment to §905(b) of the LHWCA requires the Court to recognize admiralty jurisdiction over this case. The amendment to this section provides for an action against the vessel or its owners for negligence allegedly causing a longshoreman's injuries. However, the amendments do not extend admiralty jurisdiction landward with regard to such actions. The committee contemplated that the third-party action for which the 1972 amendments provide would be brought by a longshoreman injured *while working on a vessel in navigation* and stated in its Report:

> "The purpose of the amendments is to place an employee *injured aboard a vessel* in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third-party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as 'unseaworthiness', 'non-delagable duty' or the like." (emphasis supplied) 1972 U.S. Code Cong. and Adm. News, p. 4703.

Admiralty jurisdiction has traditionally governed injuries which occur on vessels in navigation. *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972); *THE PLYMOUTH*, 70 U.S. (3 Wall.) 20 (1866). However, we are

not concerned here with an injury aboard a vessel in navigable waters. To accept the proposition that a negligence claim against a third-party for a land-based injury should be covered by the Court's admiralty jurisdiction would be to ignore completely the legislative intent of the committee in formulating the 1972 Amendments. The Fifth Circuit correctly held below that the boundaries of maritime jurisdiction as established by such decisions as *Victory Carriers, Inc. v. Law, supra*, have not been extended to embrace third-party negligence claims as are involved here.

III.

ADMIRALTY EXTENSION ACT, 46 U.S.C. 740, DOES NOT APPLY TO THIS TYPE OF CASE

The Admiralty Extension Act is altogether inapplicable to this case. That statute states in part:

> "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, *caused by a vessel on navigable waters*, notwithstanding that such damage or injury be done or consummated on land." (emphasis supplied) 46 U.S.C. 740.

Petitioner points to *Hovland v. Fearnley & Eger*, 110 F. Supp. 657 (E.D. Pa. 1952), in support of his argument that his claim is cognizable in Federal Court under the Admiralty Extension Act. There, the Court held that admiralty jurisdiction could be sustained under 46 U.S.C. 740 where the vessel's personnel caused the plaintiff's injuries by permitting waste to discharge from the ship and remain on the pier

where the accident occurred. Thus, not only is *Hovland* distinguishable from this case, but Petitioner has never alleged that his injury was caused by the negligence of any personnel of any of the vessels proximate to the situs of his accident. Rather, he alleges that the source of his accident was "the defective and negligently designed, maintained and repaired" wharf which, as previously discussed, was situated entirely on land and which by no stretch of the imagination could be considered a part or appurtenance of any vessel.

IV.

JURISDICTION IS NOT ESTABLISHED UNDER 28 U.S.C. 1337

As stated above, Petitioner is not covered under § 905(b) of the 1972 Amendments to the LHWCA since he was not injured aboard a vessel. The Amendments provide for an action against the owner of the vessel which is the situs of an injury to one entitled to sue under §905(b) as contemplated by the Committee. Petitioner was allegedly injured on a land-based wharf and consequently is not afforded the right to bring a third-party action for negligence under the 1972 Amendments to the LHWCA. It is therefore irrelevant whether the LHWCA comes within the scope of 28 U.S.C. 1337, which Parker claims establishes jurisdiction in this case. 28 U.S.C. 1337 is clearly inapplicable to an action such as this.

CONCLUSION

For the foregoing reasons, those stated by other Respondents, and those relied upon by both Courts below, Respondent Serrette respectfully submits that the judgments of the

United States District Court for the Eastern District of Louisiana and the United States Court of Appeals for the Fifth Circuit are correct in all respects and prays that the petition for writ of certiorari be denied.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing brief has been forwarded to all counsel of record by depositing same in the United States Mail, properly addressed and postage prepaid, this 4th day of February, 1977.

WINSTON EDWARD RICE